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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 412

LOUIS C. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on August 16, 1956.

### OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 25-41.

## JURISDICTION.

The judgment of the Court of Appeals was entered on August 16, 1956 (Appendix, infra, p. 42). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

## QUESTIONS PRESENTED.

(1) In **Berra v. United States**, 351 U. S. 131, the government contended, and this Court assumed arguendo, that an indictment which charged an attempt to evade income taxes by filing a fraudulent return charged both a felony offense under § 145 (b) and a misdemeanor offense under § 3616 (a) of the Internal Revenue Code of 1939. The first question presented is:

Whether an indictment charging an attempt to evade taxes by filing a fraudulent return (which indictment was returned more than three years after the filing of said return) is barred by the three year statute of limitations applicable to offenses under § 3616 (a) or whether the six year statute of limitations applicable to offenses under § 145 (b) governs.

(2) Whether, in a prosecution for attempted tax evasion under the net worth method of proof, the investigating revenue agent who summarized all the evidence at the trial and made conclusions may be cross-examined by petitioner concerning his investigation of the stock ownership in a corporation whose shares form the principal increase in assets in the net worth statement prepared by the agent where a purpose of the cross-examination is to show that petitioner is not the true owner of the stock.

(3) Whether in a prosecution for attempted tax evasion the court may instruct the jury that an inference of guilt may be drawn from the failure of petitioner to furnish

information to the investigating revenue agent when petitioner's refusal follows advice by the agent himself that any information that petitioner furnishes might be used against him.

(4) Whether the trial court should have instructed the jury, as requested, that petitioner, who had been indicted for the felony of attempted evasion of income taxes (according to the statute cited in the indictment) could be convicted of a misdemeanor for failure to pay a required tax, make a return, keep records, or supply required information.

## STATUTES AND RULE INVOLVED.

Internal Revenue Code of 1939:

Sec. 145. Penalties.

(a) [as amended by Sec. 5 (c), Current Tax Payment Act, c. 120, 57 Stat. 126.] Failure to File Returns, Submit Information, or Pay Tax.—Any person required under this chapter to pay any estimated tax or taxes, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this

chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 3616 (a) provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

§ 3748. Periods of limitation (53 Stat. 461).

(a) Criminal prosecutions. No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling or advising the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document).

For offenses arising under Section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitatiaon shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

Federal Rules of Criminal Procedure:

Rule 31. Verdict.

* * * * * * *

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

## STATEMENT.

On November 13, 1953, petitioner was indicted on a one count indictment which charged a wilful attempt to evade his income tax for the year 1947 by filing a fraudulent return on February 19, 1948. The statute alleged to have been violated on the face of the indictment was Section 145 (b) of the Internal Revenue Code of 1939 (R. 1-2). The court overruled petitioner's motion to dismiss the indictment which contended that the indictment was barred by a three-year statute of limitations for the reason that the allegations contained therein charged an offense under Section 3616 (a) of the Internal Revenue Code of 1939 (R. 3). The amounts of income and the taxes due thereon, as reported in the return and as corrected, were alleged to be as follows:

| Reported Income | Reported Tax | Corrected Income | Corrected Tax |
|---|---|---|---|
| $3,690.04 | $343.00 | $27,287.98 | $10,319.91 |

After a jury trial petitioner was found guilty as charged and was sentenced to imprisonment for a period of one year and one day and was fined $2,000.00 (R. 214-215).

The Government employed the net worth theory. This evidence is summarized as follows:

The income tax return for the year in question showed wages from employer, the Plaza Amusement Company, as $1300.00 and other income consisting of miscellaneous gambling $2,000.00, income from the Plaza Amusement Company partnership $211.15, and income from rents and royalties $178.89. The tax due was listed as $343.00 (R. 17-18). Petitioner filed no income tax returns for 1932 to 1941 inclusive (R. 14, 21). His tax returns for 1942 and 1943 had been destroyed by the Government (R. 15) and certificates of assessment and payment covering

his tax accounts for the year 1942 showed a payment of approximately $100.00 taxes and for 1943 showed a refund of $28.22 in taxes (R. 127-128). The 1944 tax return showed a total income of $1,500.00 (R. 16-17). The 1945 return listed a total income of $2,490.00 (R. 117), and the total income on the 1946 return was $5,477.96 (R. 17).

When the revenue agents on the commencement of their investigation requested that petitioner furnish a net worth statement, petitioner asked if he were compelled to give such a statement. The agents advised him that he was not compelled to answer any questions that might be used against him. Petitioner then stated he would not give a net worth statement (R. 117). Petitioner also told the agents in response to their questions that he kept no books or records, had no bank account, no safe deposit box and owned no property (R. 117). When asked the source of his funds he told one agent they came from an old mail bag, and "let's just say I dug up an old iron pot" (R. 117). In 1924 petitioner had been convicted and sentenced in the United States District Court for receiving, concealing and aiding in concealing and receiving stolen mail and for possession of stolen mail. As a result of those sentences, he was confined in a Federal Penitentiary until 1941. When questioned during this confinement, petitioner claimed no assets (R. 30-31, 34-38, 49-50).

The Government's net worth statement credited the petitioner with having total assets of $11,246.17 on December 31, 1946 and with total assets of $34,250.87 on December 31, 1947. The main item in the increase in assets in the net worth statement consisted of 166 shares of Plaza Amusement Company stock valued at $16,600.00. The Plaza Amusement Company was incorporated in 1947 (51, 53) after having been a partnership (R. 18-19, 53), of which the petitioner was a member. Twenty-two shares of stock of the corporation were issued to the petitioner in 1947 as

his proportion of the ending balance in the partnership (R. 53). Plaza's cash receipt book showed that the money invested in the corporation was entered as loans from its lawyer (R. 71-72). Later this name was scratched out and the word "Stockholders" was inserted under "Loans Payable" (R. 72). These loans had come into the corporation in lump sums (R. 58) and its accountant admitted that the records of the company did not show that petitioner had loaned any money to the corporation (R. 56) but only showed a lump sum as being loaned by its stockholders (R. 61). The accountant, however, prepared work papers so that he could issue stock (R. 54). In his work papers he wrote down the loan figure that appeared in the general ledger and listed the amount of loans received to the various stockholders in proportion to the interest that he thought they had (R. 64). This was the basis on which 166 shares of Plaza Amusement Company stock at $100 par value each in 1947 was issued to petitioner (R. 53, 59, 61). Petitioner reported dividends from Plaza Amusement Company stock on his 1951 income tax return (R. 87). An officer of the Plaza Amusement Company testified on behalf of the Government that his brother, a stockholder in the company (R. 51), loaned petitioner $12,000.00 in 1947 to put in the Plaza Amusement Company as defendant's share (R. 52, 108). The Government was also permitted to cross-examine this witness as a hostile witness.

The revenue agent gave no credit for this $12,000 loan and never had contacted the lender (R. 134). The only revenue agent who testified at the trial was the principal agent who investigated petitioner. He prepared a net worth statement and gave a summary of all testimony in the case. Petitioner was not allowed to ask this witness on cross-examination whether or not he had been investigating the Plaza Amusement Company for the purpose of proving that its stock was held in fictitious or straw party names (R. 134), and whether he had made statements in-

dicating that he believed that the record owners of the Plaza stock were not the true owners (R. 135). Petitioner's purpose was to show that he was not a true owner of stock in the Plaza Company. He sought to develop whether the witness had information in his possession to show that the petitioner was not the real party in interest (R. 135-136, 144). The witness claimed the privilege against testifying concerning confidential governmental matters by saying that he was not authorized to testify about the affairs of any taxpayer other than petitioner was upheld. Petitioner further asked the witness if he had investigated Plaza Amusement Company to determine if some of its stockholders were dummies. This was met by the same answer, which was again upheld (R. 145-146). After the witness under questioning by Government counsel stated he had no indication that petitioner was not the owner of Plaza stock, petitioner again was not allowed to ask the witness questions about the investigation of the Plaza Amusement Company (R. 148-149).

The trial court instructed the jury that any failure on the part of petitioner "to supply any information for the purpose of the computation, assessment, or collection of his income tax, which you find to be unjustified or inexcusable, is a circumstance which might be considered in your determination of his guilt or innocence" (R. 190). The Court further instructed the jury, relative to petitioner furnishing explanations to the agents as to source of his funds, by saying that if relevant leads were not furnished to the agents the Government was not required to "negate every conceivable source of non-taxable funds, and if the petitioner failed to supply information to the agents in that regard, you may take such failure into account" (R. 194).

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than the one cited in the indictment. Under a proposed charge the jury would have been instructed to find him guilty of a violation of

Section 145 (a) of the Internal Revenue Code of 1939 if it believed that he had wilfully failed to pay taxes, make returns, keep records, or supply information required by law (R. 203). The trial court refused this request.

The Court of Appeals affirmed the conviction, following its decisions in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, and **Berra v. United States**, 8 Cir., 221 F. 2d 590, and held that the indictment was not barred by the statute of limitations because Section 3616 (a) was inapplicable to income tax violations. In regard to the instruction which allowed an inference of guilt from the failure of petitioner to furnish information, the court following **Beard v. United States**, 4 Cir., 222 F. 2d 84, 93, held the instruction proper and said that taxpayers' records were public records which fell without the Fifth Amendment under the rule laid down by **Shapiro v. United States**, 335 U. S. 1, and the fact that petitioner "did not keep records or the fact that he did keep records and refused to disclose them was a proper subject for comment by the court." As for the cross-examination of the revenue agent, the court said that this subject matter was not covered on direct examination and that this denial was a proper exercise of the trial court's discretion to keep the examination within reasonable bounds. The court apparently also concluded that a lesser instruction was not required on the authority of the **Dillon** case which held in a similar prosecution that a Section 145 (a) violation was not supported by the evidence.

## REASONS FOR GRANTING THE WRIT.

1. Petitioner's position is that the instant indictment charges an offense under § 3616 (a) of the Internal Revenue Code of 1939, that the three year limitation period set out in 26 U. S. C. A., former 3748, is applicable and, that, therefore, the instant indictment is barred by the statute of limitations.

The court below in refusing to dismiss the indictment on this ground found that the indictment did not charge an offense under Section 3616 (a) of the Internal Revenue Code of 1939. The court, relying on its decisions in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, and **Berra v. United States**, 8 Cir., 221 F. 2d 590, held that Section 3616 (a) was inapplicable to income tax cases, and that the Supreme Court in the **Berra** case, 351 U. S. 131, did not pass upon that issue but limited its decision to the conclusion that it was not for the jury's determination to decide whether it would apply Section 3616 (a) rather than Section 145 (b). In the **Dillon** case the court below had concluded "both from the language of § 3616 and the statutory context where it was formerly placed, that it was never intended to apply to income tax violations." 218 F. 2d at 103. The court, in reaching this result, found that Section 7207 of the 1954 Internal Revenue Code which replaced Section 3616 was broad enough to apply to income tax derelictions and that the "element of wilfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted." 218 F. 2d at 103.

In the **Berra** case, under an indictment similar to the instant one, it was the Government's position that "the allegations of the indictment and the Government's proof at the trial are sufficient to support a conviction under either Section 145 (b) or 3616 (a)." Brief for the United States, p. 11. Two judges of this Court were of the opinion in that case that the offense charged was only a misdemeanor under Section 3616 (a). The majority opinion did not oppose this principle set forth in the minority opinion, but merely held that the issue had not been properly presented for review.

Further, Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases. The language, "with intent to defeat or evade," clearly

indicates the necessity for proof of willfulness. Moreover, the mere omission of the word "willful" in a criminal statute would not eliminate intent as an element of the offense. **Morissette v. United States**, 342 U. S. 246. The predecessor of Section 3616 was enacted in 1864 as part of a Revenue Act which imposed an income tax and provided for income tax returns.[1] Section 3616 is collocated in the Internal Revenue Code of 1939 next to Sections 3614 and 3615 which authorize the issuance of summons for the inspection of records for the determination of tax liability, including income tax liability. These all point to its application to fraudulent income tax returns. Section 3616 is incorporated into Section 7207 of the Revenue Act of 1954, which the court below in the **Dillon** case found applicable to income tax dereliction. Overlooked in this regard was the fact that both the Senate and House committee reports relative to Section 7207 state that it did not change existing law.[2] The applicability of Section 3616 to fraudulent income tax returns has been tacitly assumed in a number of cases.[3]

The allegations in the instant indictment should be construed to charge only an offense under § 3616 (a) rather than an offense under § 145 (b). This was the view of the dissent in the **Berra** case which said: "Since Congress has specifically made the conduct charged in the indict-

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[1] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285. § 3616 was more immediately derived from R. S. § 3179.

[2] The Senate Report states: "This section which is identical with the House Bill contains no material change in existing law." S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954) 603, 1954 U. S. Code Congressional Service 5253. The House Report is identical. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. (1954) A. 425, 1954 U. S. Code Congressional Service 4573.

[3] *Ex Parte Cohen*, 9 Cir., 191 F. (2d) 300, certiorari denied, 342 U. S. 947; *Taylor v. United States*, 9 Cir., 179 F. (2d) 640, 643-644; *Kirsch v. United States*, 8 Cir., 174 F. (2d) 595, 597-598; *Slick v. United States*, 7 Cir., 1 F. (2d) 897; *Ex Parte Berkoff*, D. Minn., 65 F. Supp. 976, 979-981; *United States v. Koppelman*, N. D. Pa., 61 F. Supp. 1007, 1008-1009.

ment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145 (b)." 76 S. Ct. at 690. The dissent apparently reaches this conclusion in order to assure that all persons are treated alike under the law. The majority opinion does not reach this issue.[4]

Reason supports this conclusion. If the allegations of an indictment charge both a felony and a misdemeanor, a defendant cannot be punished under both statutes without offending the double jeopardy provision under the Fifth Amendment to the United States Constitution. A defendant may be convicted of two separate offenses arising from a single act only if each requires proof of a fact not essential to the other. **Pereira v. United States**, 347 U. S. 1, 9; **United States v. Beacon Brass Co.**, 344 U. S. 43, 45. When the crimes committed by different individuals are the same, they must be punished in the same manner by the same range of punishment. Punishment for the same offense may be more severe only if there is a rational basis for difference in punishment such as a prior conviction. E. g., **Moore v. Missouri**, 159 U. S. 673, 678; **Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe**, 302 U. S. 51, 54. An unreasonable discrimination in punishment among defendants would violate the due process clause of the Fifth Amendment to the United States Constitution. In **State v. Pirkey**, 281 P. 2d 698 (Or. 1954), a statute which delegated to a grand jury or a magistrate the power to determine in advance whether to charge a defendant with a felony or a misdemeanor for the same offense without fixing a standard for the exercise of that discretion was held to violate the equal protection clause of the State and Federal Constitution, and an indictment drawn pursuant to such statute was dismissed. See also

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[4] The decision in the *Berra* case has been found to be ambiguous. *United States v. H. J. K.*, 2 Cir., August 20, 1956. Other decisions interpreting *Berra* are: *United States v. Moran*, 2 Cir., August 15, 1956; *United States v. Hoover*, 3 Cir., May 29, 1956; *United States v. Allied Stevedoring Corp.*, S. D. N. Y., July 20, 1956.

**State v. Cory,** 282 P. 2d 1054 (Or. 1954). In lieu of reaching these constitutional questions the Court should hold that the allegations of such an indictment require the choice of the lighter range punishment and consequently only charge the lesser of the two crimes.[5] Such a choice here would be in accord with the rule of strict construction of criminal statutes in favor of the accused. This would end the only discrimination of which a defendant could complain. It would also prevent an implied repeal of Section 3616 (a). Prosecutions under Section 145 (b) could still be had if the indictment alleged additional acts not covered by Section 3616 (a).

If a person charged under the instant indictment can only be punished under the misdemeanor provisions of Section 3616 (a) it would follow that the statute of limitations relative to that statute would be the only one applicable. Otherwise, the Government could wait till the statute of limitations for the lesser offense ran and claim that since it could not prosecute for the lesser offense because of the limitation period it could still prosecute for the greater offense. Such an anomalous result was never intended by Congress.

**United States v. Beacon Brass Company,** 344 U. S. 43, has held that an attempt to evade taxes "in any manner" under Section 145 (b) includes the filing of a fraudulent return. However, Section 3616 (a) was not brought to the Court's attention and therefore the **Beacon Brass** case is not a good holding for this proposition. **Spies v. United States,** 317 U. S. 492, considered the question as to whether a willful failure to file a return, together with a willful failure to pay tax, without other evidence constitute an attempt to evade a tax within the meaning of Section 145 (b), inasmuch as Section 145 (a) specifically made these

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[5] In determining the unit of punishment, *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-222, held that before a Court should choose the harsher alternative, Congress should be required to have spoken "in language that is clear and definite."

two derelictions misdemeanors. The Court said (317 U. S. at 497): "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in Section 145 (b) meant no more than the same derelection it had just defined in Section 145 (a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of the system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency."

Thus if Congress had not enacted Section 145 (a) the conduct prescribed by that section could have been considered to be covered under Section 145 (b) as an intent to defeat or evade tax in any manner. The same principle is applicable to Section 3616 (a). Filing a false and fraudulent return might be held to constitute an attempt to defeat or evade tax in any manner were it not for the fact that Congress has specifically made such conduct a misdemeanor under Section 3616 (a). Where there are two acts on the same subject matter, effect should be given to both, if possible. **United States v. Borden Co.**, 308 U. S. 188, 198. Effect would be given to both statutes by holding that the mere willful filing of a fraudulent return with intent to defeat taxes only constitutes a misdemeanor of Section 3616 (a). Under this view the instant indictment only charges a violation of the lesser offense.

Section 3748 of the Internal Revenue Code of 1939 provides a three-year statute of limitations period for offenses arising under the Internal Revenue laws with certain exceptions which set forth a six-year limitation period. A

six-year period is provided for the offense of "willfully attempting in any manner to evade or defeat any tax."

The three-year limitation period is applicable to offenses under Section 3616 (a). Congress has so recognized in the Internal Revenue Code of 1954. Section 6531 of the Internal Revenue Code of 1954 has replaced Section 3748 in regard to the period of limitations. The report of the House Committee relative to the Internal Revenue Act of 1954 was that Section 6531 changed existing law by providing a six-year period of limitations for various offenses, including crimes under Section 7207, the 1954 Code equivalent of Section 3616 (a). H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 4564. The Senate Committee report after stating that the House bill changed existing law by providing a six-year period of limitations for offenses under Section 7207 and other specific internal revenue violations, concluded: "Your Committee has restored the existing law with respect to the period of limitations applicable to each of these offenses." S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5236. The conference report adopted the House version.[6]

Section 7851 (a) (6) (c) (iii) of the Internal Revenue Code of 1954 also provides that the 1954 periods of limitation should not be applicable to offenses under the 1939 Code.

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[6] H. Rep. No. 2543, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5340, provides: "Amendments Nos. 486 (1) (2) (3). These amendments to Section 6531 of the House bill removed from the listed criminal offenses to which the six-year period of limitation applies under the bill the following offenses: (1) The offense of willfully failing to pay the tax or make any tax return at the time or times required by law or regulations; (2) the offenses described in Sections 7206 (1) and 7207, relating to false statements and fraudulent documents; (3) the offense described in Section 7212 (a) relating to intimidation of officers or employees of the United States; and (4) the offenses described in Section 7214 (a) committed by officers and employees of the United States. The Senate recedes."

The six year period provided in the second exception of § 3748 for the offense of "willfully attempting in any manner to evade or defeat any tax" was added by the Internal Revenue Act of 1932, 47 Stat. 288, subsequent to the decision in **United States v. Scharton**, 285 U. S. 518, which held that a charge of attempting to evade taxes under § 145 (b) was not defrauding or attempting to defraud the United States within the meaning of the first exception in Section 3748. It should be noted that this second exception contains the identical language with that contained in Section 145 (b) and other equivalent sections in the Internal Revenue Code of 1939.[7] Such an excepting clause should be narrowly construed. **United States v. Scharton**, supra. It should only be applicable to indictments which charge offenses under § 145 (b) alone and its equivalent sections.

Section 3748 further provides:

> "Where a complaint is instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district."

This provision apparently only has application to the six-year exception provisos. If so, it indicates that the exceptions only apply to felonies, as there is no need for such a provision for misdemeanors inasmuch as an information charging a misdemeanor does not need the action of the grand jury.

2. Petitioner was not allowed to cross-examine the revenue agent as to whether or not he had been investigating

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[7] Section 894 (b) (2) (c) (estate tax); Section 1024 (b) (gift tax); Section 1718 (b) (admission and dues tax); Section 1821 (a) (2) (documents, instruments and playing cards); Section 2156 (b) (tobacco, snuff, cigars and cigarettes); Section 2479 (coconut and vegetable oils); Section 2557 (b) (3) (opium, coca leaves, and narcotics); Section 2601 (marihuana); Section 2707 (c) (pistols and revolvers); Section 3298 (c) (wagering taxes).

the Plaza Amusement Company for the purpose of proving that its stock was held in fictitious or straw party names (R. 134), and whether he had made statements indicating that he believed that the record owners of the Plaza stock were not the true owners (R. 135). Petitioner's purpose was to show that he was not the true owner of this stock, which was the asset principally responsible for the net worth increase. The trial court sustained the agent when he asserted the privilege against divulging confidential governmental information (R. 145-146). The court below affirmed on the ground that the trial court properly exercised his discretion in limiting cross-examination.

The witness had no right to claim the privilege for governmental secrets. The rule is well settled that the Government can invoke its evidentiary privilege not to reveal a Government secret only at the price of letting a defendant go free. **United States v. Andolschek**, 2 Cir., 142 F. 2d 503, 506; **United States v. Beekman**, 2 Cir., 155 F. 2d 580, 584; **United States v. Krulewitch**, 2 Cir., 145 F. 2d 76; see also **United States v. Reynolds**, 345 U. S. 1, 12.

Cross-examination of a witness within the permitted limitations is a matter of right. **Alford v. United States**, 282 U. S. 687. That case reversed a conviction where the cross-examination was unduly restricted. The Court said (282 U. S., at 692):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not in general apply * * * it is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the Court what fact a reasonable cross-examination might develop * * * to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts

tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

It is not uncommon to obtain, by cross-examination alone, an adequate exposure of the witness' inconsistencies; and no artificial limits should be set for its employment. 3 Wigmore, Evidence (3rd ed.), § 1023.

The instant cross-examination was unduly restricted. The investigation of the Plaza Amusement Company was intimately tied to the investigation of defendant. The $16,600 in shares of the Plaza Amusement Company was recognized by Government counsel to be the main item in their case (R. 150). Defendant was entitled to show whether the investigation of the agent revealed any dummy stockholders in that corporation. Especially was the defendant entitled to this cross-examination after the agent answered in response to a Government question that his investigation of defendant did not indicate defendant was not the owner of this stock. The great importance of the revenue agent's investigation in a net worth case emphasized in **Holland v. United States**, 348 U. S. 121, and the broad role of the expert witness in cases of this character illustrated by **United States v. Johnson**, 319 U. S. 503, both should mean that defendant has an equally broad right of cross-examination. The revenue agent, as an expert witness, is given the right to sum up all of the evidence and give his conclusions. Under such circumstances defendant should be allowed to cross-examine him relative to a related investigation interwoven with the instant case. It is difficult to see how the agent could separate his investigation of defendant and his investigation of the Plaza Amusement Company. If any of its stock was held in a straw party name that fact should have been presented to the jury. In any event it is not necessary to know in advance where cross-examination may lead. It is enough if, on its face, the question is within the legitimate limits

of cross-examination. It was defendant's right to show the basis for the conclusion that defendant was the true owner of the stock. And if defendant had been allowed to cross-examine the witness, he may have been able to show, for example, that some of the stockholders were straw parties. The status of ownership of the other record stockholders may have shed light on defendant's status at Plaza.

3. The court below found that instructions were not erroneous which allowed an inference of guilt from the failure of petitioner to supply information (R. 190, 194). The revenue agent had testified that when he asked petitioner for a net worth statement petitioner answered by asking if he was compelled to give such a statement. The agent advised him that he was not compelled to answer any questions that might be used against him. Petitioner then replied that he would not give him a net worth statement (R. 117). This refusal to supply information was in effect a claim of the privilege against self-incrimination under the Fifth Amendment. **Quinn v. United States**, 349 U. S. 155, 162. The court below held in citing **Beard v. United States**, 222 F. 2d 84, 93, that the record keeping requirement under the internal revenue laws made any tax records public records and outside the Fifth Amendment under **Shapiro v. United States**, 335 U. S. 1. It did not distinguish the request for the net worth statement from the record requirements of the code.

It is true that the **Beard** case as well as **Myres v. United States**, 8 Cir., 174 F. 2d 329, 337, and **Olson v. United States**, 8 Cir., 191 F. 2d 985, 988-989, have approved instructions which stated that the failure or refusal of taxpayer to produce his books and records might be construed to be a circumstance in determining the issue of willfulness. Those cases, however, are readily distinguishable because in none of them did the agent advise the taxpayer that he was not compelled to furnish informa-

tion. They, thus, did not involve any claim of the privilege against self-incrimination.

This court has recently held that no inference of guilt may be drawn from the claim of privilege against incrimination under the Fifth Amendment. **Slochower v. Board of Higher Ed. of City of New York**, 76 S. Ct. 637. In the instant case the petitioner refused to furnish a net worth statement after such a claim. Petitioner's failure to supply this information should not have been considered by the jury as evidence of willfulness in establishing his guilt. It is only when a taxpayer as in the **Myres v. Olson** and **Beard** cases does not claim his privilege that his failure to supply information or records might be considered by the jury on the issue of willfullness.

4. The trial Court refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 145 (a) of the Internal Revenue Code of 1939 if it found that he wilfully failed to pay taxes, make a return, keep records, or supply information required by law. The court apparently following its decision in **Dillon v. United States**, 218 F. 2d 97, in regard to § 145 (a), that there was no evidence offered "that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed" and therefore it was not error to instruct on an offense not presented by the evidence. 218 F. 2d, at 101.

This issue was one of the questions presented in **Dillon v. United States**, certiorari granted, 349 U. S. 914. The **Dillon** case was dismissed on the death of petitioner. 76 S. Ct. 112. This question, however, was not presented in **Berra v. United States**, supra, which presented a common question as to a lesser offense under Section 3616 (a).

Rule 31 (c) of the Federal Rules of Criminal Procedure provides that a defendant may be found guilty of a lesser offense "necessarily included in the offense charged."[8] Section 145 (a) makes it an offense to fail to pay a tax, to fail to make a return for the purpose of the computation, assessment or collection of a tax, to fail to keep any records for such tax purposes, or to fail to supply information for such purposes. We assume, arguendo, that the indictment charges an offense under Section 145 (b).

It is impossible to violate Section 145 (b) without violating Section 145 (a). If a "necessarily included" offense means that "it is impossible to commit the greater without first having committed the lesser," as the government has contended,[9] then this misdemeanor is included in the felony involved. Every wilful attempt to evade income taxes under § 145 (b) necessarily includes a default in payment, a failure to make a return, a failure to keep proper records, or a failure to supply required information. One or more violations of Section 145 (a) are "necessarily included" in every violation of Section 145 (b) and one or more offenses under the former section are therefore necessarily included in an offense under the latter section. A wilful attempt to evade taxes in any manner will always include one or more of the omissions proscribed by Section 145 (a). One default always present in the greater offense is that a tax be due. A failure to keep required records is present in every case. Section 54 of the Internal Revenue Code of 1939, imposes a duty on every taxpayer to "keep such records . . . as the Com-

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[8] Under a charge of murder, defendant may be convicted of manslaughter, *Stevenson v. United States*, 162 U. S. 313, 315, or even negligent manslaughter. *Barbeau v. United States*, 9 Cir., 193 F. 2d 945, 946-948. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766.

[9] *Dillon v. United States*, Oct. Term, 1954, No. 629, Brief for the United States in Opposition.

missioner, with the approval of the Secretary, may from time to time prescribe." The records required to be kept are prescribed in the Regulations. Treasury Regulation 111, § 29.54-1, provides with certain exceptions that "for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax," permanent records shall be kept "as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown by any return . . .". Cf. **United States v. Carroll**, 345 U. S. 457, 459-460. The examples of indicia of fraud pointed out in **Spies v. United States**, 317 U. S. 492, all show failures to keep records which truly reflect income. A failure to supply the required information is present in cases where the evidence shows the defendant kept a double set of books, made false entries, used false invoices, destroyed books or records, concealed assets, concealed his income source, or handled his affairs to avoid making the usual records. The misdemeanor and the felony both require a failure to make a disclosure as to the amount of income of the taxpayer. The failure to file returns may constitute a violation of the felony section if other affirmative aggravating acts are shown.

**Spies v. United States**, 317 U. S. 492, presented the question as to whether a wilful failure to file a return, together with a wilful failure to pay a tax without other evidence constituted an attempt to evade a tax within the meaning of Section 145 (b). Although this Court held that it took more than the sum of two such misdemeanors to make a felony violation under Section 145 (b), it concluded that a felony may include lesser offenses in combination with each other or with other elements and that the felony proscribed under Section 145 (b) included one or several of the other offenses against the revenue laws. This Court also pointed out in the **Spies** case that the felony involved "some wilful commission in addition to the willful omis-

sions that make up the list of misdemeanors." The wilful commission would be the aggravating offense lifting this misdemeanor into the felony.

The evidence in this case required such an instruction. The government's theory was that petitioner kept no records. The evidence, therefore, must support the inference that he failed to keep the records required by Section 145 (a). The government also contended that petitioner did not pay all of the tax that he should have paid and thus proved a failure to pay tax. The government's position also supports the inference that petitioner failed to supply information and failed to make a complete return of all of his income. If Section 145 (a) in proscribing an offense for failure to make a return also includes a failure to make a complete return, then this too would be embraced by the evidence.

Where there is evidence to show either a felony or one or more misdemeanors the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence and if there is a lesser offense embraced within a greater offense, a defendant should be entitled, when he so requests, to the verdict of the jury on this issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

## APPENDIX.

### Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,360.

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|---|---|
| Louis C. Smith, Appellant, vs. United States of America, Appellee. | Appeal from the United States District Court for the Eastern District of Missouri. |

[August 16, 1956.]

Morris A. Shenker (Sidney M. Glazer was with him on the brief), for Appellant.

Robert C. Tucker, Assistant United States Attorney (Harry Richards, United States Attorney, and Charles H. Rehm, Assistant United States Attorney, were with him on the brief), for Appellee.

Before Sanborn, Woodrough and Vogel, Circuit Judges.

Vogel, Circuit Judge.

Louis C. Smith appeals to this court from a judgment of conviction entered on June 2, 1955, in the United States District Court for the Eastern District of Missouri upon a jury verdict finding him guilty under an indictment charging a violation of former 26 U. S. C. A. 145 (b) of the

Internal Revenue Code of 1939. He was sentenced to imprisonment for a period of one year and one day and fined $2,000.00. The indictment charged that on February 19, 1948, the appellant did wilfully attempt to defeat and evade his income tax for the year 1947 by filing a false and fraudulent return, wherein he stated that his adjusted gross income for 1947 was the sum of $3,690.04 and that his income tax was $343.00, whereas his adjusted gross income was the sum of $39,984.49 and his tax was $17,759.58.

The appellant's income tax return for the year in question showed wages from an employer, the Plaza Amusement Company, as $1,300.00 and other income as $2,390.04. The other income allegedly consisted of $2,000.00 from miscellaneous gambling, income from the Plaza Amusement Company partnership $211.15, and income from rents and royalties $178.89, wherefrom appellant claimed he owed a tax on only $343.00.

The government attempted to prove its case by the increase in net worth method. Accordingly it had to establish a base or starting point from which increases or decreases of net worth in following periods could be properly figured. This particular case presented unusual difficulty. The appellant had kept no books, records, bank accounts or any of the ordinary media whereby one's financial operations may be traced. Appellant was uncooperative with the revenue agents. When asked the source of his funds, he told one agent they came from an old mail bag and, "Let's just say I dug up an old iron pot." Reference to an old mail bag and buried money may not have been entirely facetious. In 1924 appellant had been convicted and sentenced in the District Court for the Eastern District of Missouri and the Southern District of Illinois to concurrent sentences for receiving, concealing and aiding in concealing and receiving stolen mail and for possession of stolen mail. As a result of

those sentences, he was confined in the Federal Penitentiary at Leavenworth, Kansas, until sometime in 1941.

The records indicate that the appellant filed no income tax returns for 1932 to 1941, inclusive. His tax returns for 1942 and 1943 had been destroyed by the government. Certificates of assessment and payments covering appellant's tax accounts for the years 1932 through 1948 were introduced into evidence over objection. Tax returns for the years beginning with 1944 were offered and received.

Appellant did not testify and he offered no witnesses in his behalf.

Numerous points have been raised by the appellant in this court. They will be discussed individually as they appear in appellant's brief.

Appellant's first point is that:

> "The Court erred in not allowing defendant to cross-examine Revenue Agent Robert Bell as to his investigation of the Plaza Amusement Company and as to statements made relative to the Plaza Amusement Company and in refusing to strike his testimony because of the undue limitation to his cross-examination."

During the cross-examination of Bell by counsel for the appellant, the witness was asked if he wasn't really investigating Plaza Amusement Company to determine whether stock was actually held in the names of straw parties. There was no testimony on direct that the witness had conducted such an investigation of Plaza Amusement Company or that stock listed was in the name of straw parties. The question for determination at that point in the trial was whether or not the appellant owned 166 shares of stock in the Plaza Amusement Company and the court limited the examination to that issue and matters directly bearing thereon. To sustain his conten-

tion, appellant relies upon two cases wherein the Government was attempting to suppress confidential reports: **United States v. Andolschek**, 2 Cir., 1944, 142 F. 2d 503; **United States v. Beekman**, 2 Cir., 1946, 155 F. 2d 580. No such motive for restriction of cross-examination was here present. The trial court was merely exercising its discretion to keep the scope of examination within reasonable bounds.

Appellant's second point is that:

> "The Court erred in admitting into evidence Government Exhibit 35 (net worth statement), in admitting into evidence conclusions of witness Robert Bell and in overruling defendant's objections to the hypothetical question asked witness Robert Bell relative to defendant's tax and income."

While conceding the propriety of admitting a revenue agent's summary of his testimony (**United States v. Johnson**, 1943, 319 U. S. 503, 519), appellant claims that the summary herein did not find support in the evidence. Exhibit No. 35 is the usual summary, customary in net worth cases, which sets forth in compact form the evidence produced by the government tending, in this case, to establish the appellant's net worth on December 31, 1946, as $11,224.17 and his net worth on December 31, 1947, as $34,195.54, an increase during the indictment year of $22,971.37. Adding to this his estimated living expenses and gifts of $4,565.01 and taking into account reserve for depreciation and a non-taxable pension of $248.04, left a total to be accounted for of $27,536.38. Balancing this against his 1947 return left, according to the government figures, an unreported income of $23,597.94 for the indictment year. Each item of asset or liability is based on testimony of government agents admissible for the jury's consideration. The accumulation may not be figure perfect; it might be suspect if it were. It was the govern-

ment agent's best estimate of the appellant's financial growth during the year in question.

One of the principal objections to Exhibit 35 was that it did not include an alleged liability of $12,000.00, representing a claimed loan in 1947 to the appellant from one Frank Wortman. The information with reference to the claimed loan appeared in this fashion: Edward Wortman was called as a government witness. Because of his hostility, the government was permitted to cross-examine him. During the examination, Edward Wortman testified that his brother Frank had made a loan of $12,000.00 to the appellant in 1947. This was the first time the government auditors had heard of such alleged loan. They can hardly be criticized for failure to investigate it prior thereto and we see no error in failing to include it in the summary. It was the bare assertion of a hostile witness made at the trial that his brother had made a $12,000.00 loan to the appellant some years prior thereto. The jurors heard the testimony. They could believe it or not, and certainly the right to cross-examine remained with counsel.

With regard to government computations such as we have in question here, the Court of Appeals for the Sixth Circuit in **Gariepy v. United States,** 1951, 189 F. 2d 459, 462, said:

> "At best it was, of course, but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record. **United States v. Johnson,** 319 U. S. 503, 519, 63 S. Ct. 1233, 87 L. Ed. 1546; **Bell v. United States,** 4 Cir., 185 F. 2d 302."

In numerous cases this court has approved of the use of summaries similar to Exhibit 35. See **Kampmeyer v. United States,** 8 Cir., 1955, 227 F. 2d 313, 317, and cases cited therein. We find no error in the admission of Exhibit 35.

Appellant's main objection to the hypothetical question asked Agent Bell is on the same ground used in objecting to Exhibit 35, in that the hypothetical question did not include any reference to the $12,000.00 item as a liability of the appellant. We think, in view of all the circumstances, that the question was not improper, even though it did exclude the $12,000.00 item. As referred to heretofore, the only evidence regarding that item came from a hostile government witness who, because of his hostility, was cross-examined with the court's permission. Edward Wortman testified that not he but his brother Frank had made a loan of $12,000.00 to appellant. Frank Wortman was not called and did not testify. Bell, in his summary, Exhibit 35, did not include the alleged loan as a liability of appellant. In formulating the hypothetical question, government counsel also omitted the $12,000.00 item. We think it was not error to overrule objection to the question on the grounds stated. The witness was cross-examined by appellant's counsel regarding the alleged loan. The jurors heard the testimony and they could believe or disbelieve whom they wished. In any event, we think it makes little practical difference. The government's evidence and the answer to the hypothetical question tended to show an adjusted gross income of $27,287.98 and a tax liability of $10,319.91. Even if the $12,000.00 item had been established, the amount of understated taxable income was nevertheless substantial. The government is not required to show the exact amount of error. If the understated taxable income be substantial, that is sufficient because the exact amount is not the gist of the offense. **Cave v. United States**, 8 Cir., 1947, 159 F. 2d 464, 468.

On this point, appellant cites several cases, including one from this court: **Kirsch v. United States**, 8 Cir., 1949, 174 F. 2d 592, 600-2. In the **Kirsch** case, there was no evidentiary support for an essential assumed fact and,

furthermore, the assumed fact was disproved by the government's own evidence. What constitutes a proper foundation to establish the truth of an assumed fact is largely up to the trial court, but in that case there was no foundation to be found. The revenue agents made no attempt to ground their assumption on adequate investigation; the hypothetical question there used contained an assumption clearly unwarranted. The hypothetical question here used is not subject to the same defect. The other cases cited by appellant are not in point.

Appellant's third claim of error is:

> "The Court erred in admitting into evidence Exhibits 13, 14, 15 and 19."

These exhibits were used to establish that appellant claimed to have no assets while in the penitentiary. Appellant contends that the exhibits were confidential records not open to the prosecution under Section 2.14, 28 C. F. R. As to Exhibits 13, 14 and 15, appellant is clearly mistaken since Section 2.14 applies only to data gained through a parole hearing before the Board of Parole. Exhibits 13, 14 and 15 are records executed by the appellant himself and were not a part of an oral parole hearing provided for in Section 2.14. Exhibit 19 consists of an interview before the Board of Parole and may be classified as confidential under the regulations. If, however, it was error to admit Exhibit 19, we think it was not prejudicial. Exhibits 13, 14 and 15, standing alone, were sufficient evidence of net worth to establish a starting point. Exhibit 19 was not an essential document upon which the government's case stands or falls. Exhibits 14 and 15 and, to a lesser extent, Exhibit 13 establish the same thing that Exhibit 19 helped establish—that the appellant had no substantial assets during a certain period. The cumulative effect of the exhibits was to partially corroborate the government's opening net worth

estimate. We accordingly hold that the admission of Exhibit 19 was not unduly prejudicial to the appellant so as to constitute reversible error.

Appellant further argues that these exhibits were inadmissible because uncorroborated. **Smith v. United States,** 1954, 348 U. S. 147, 155, clearly holds that the corroboration requirement applies to admissions, at least where the admission is made **after** the fact and the statement embraces an element vital to the government's case. On admissions **prior** to the crime, it was earlier decided that such admissions need no corroboration. **Warszower v. United States,** 1940, 312 U. S. 342, 347:

> "The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In **Gulotta v. United States,**[1] the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In **Duncan v. United States** (68 F. 2d 136) and in **Gordnier v. United States** (261 F. 910) the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion (citing **Miles v. United States,** 103 U. S. 304)."

In addition thereto, appellant's tax returns subsequent to his release from prison and prior to the indictment

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[1] 113 F. 2d 683, a case from this circuit and relied upon by the appellant as support for his contention.

sufficiently corroborate the exhibits in question. **Smith v. United States**, supra, at pages 157 and 158.

Point No. 4 is:

> "The Court erred in admitting into evidence Exhibits 21A to 21W, identified as work papers of George Frank."

George Frank was the accountant for the Plaza Amusement Company. These records were prepared by him in the ordinary course of business and contemporaneously with the issuance of stock to the stockholders of Plaza Amusement Company. In support of his contention, appellant cites the case of **Hayes v. United States**, 10 Cir., 1955, 227 F. 2d 540, 544. That case is not comparable. The exhibit offered in the **Hayes** case was prepared by a tax expert long after the events it was attempting to portray and in preparation for trial. It was properly denied admission. The admissibility of records and entries made in the regular course of business is today unquestioned. **United States v. Mortimer**, 2 Cir., 1941, 118 F. 2d 266, cert. den. 314 U. S. 616. This is especially true in United States courts. 28 U. S. C. A., § 1732. Of course, other circumstances, such as "lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility".

Appellant's fifth point is:

> "The Court erred in overruling defendant's motion for a mistrial after Government counsel asked witness Edward Wortman if his brother Frank Wortman had been convicted of a crime and sentenced to 10 years."

Edward Wortman, the president of the Plaza Amusement Company, had testified in behalf of the government. The government was allowed to interrogate him as a hostile witness. A number of questions were directed to him concerning his brother Frank Wortman. The witness

testified that his brother had been sentenced to jail by Judge Moore for refusing to tell a grand jury where he lived. He was then asked the following question:

> "Q. For further purpose of identification, sir, I will ask you if this is the same Frank Buster Wortman who was sentenced in 1934 to 10 years on a charge of resisting a United States Officer?"

Objection to the question was promptly sustained but appellant's motion for a mistrial was overruled. Appellant claims that the statement or question of government counsel was of such an exceptionally prejudicial character that no statement by the court could remove the harmful effect caused by it. Of course, the question should not have been asked and it having been asked would have justified an instruction to the jury to disregard the question. We think, however, that failure to grant a mistrial was not reversible error. See and compare: **Dolan v. United States**, 8 Cir., 1955, 218 F. 2d 454, 460; **Davis v. United States**, 8 Cir., 1956, 229 F. 2d 181 186-187. In the first place, the improper question referred to a brother of the witness, not to the appellant himself. Only by resort to a circuitous type of reasoning could it be conceived that testimony regarding the prior conviction of a witness' brother was tantamount to a hostile reflection upon the character of appellant. Secondly, the trial judge was in a far better position to determine whether prejudice had resulted than are we. He saw the jurors, the witnesses and the appellant, and it very apparently was his considered judgment that the improper question about a witness' brother had not prejudiced the appellant. We will not disturb his conclusion.

The sixth point raised on appeal is that:

> "The Court erred in overruling appellant's motion for judgment of acquittal at the close of the entire case."

Appellant herein attacks the sufficiency of the evidence o justify conviction and claims that the government ailed to establish with reasonable certainty an opening et worth to serve as a starting point on which to calcuate any increase in the appellant's assets. The governnent's theory was that Exhibits 13, 14, 15 and 19, plus ertificates of assessment and payments beginning with the year 1932 and his tax returns for the years 1944, 1945 and 1946, established that the appellant had no assets of any substantial consequences prior to December 31, 1946, at which time it was claimed that his net worth totalled $11,224.17. The establishment of a net worth starting point cannot be done with mathematical certainty and each case presents its own peculiar difficulties. The appellant was asked by the government investigators during their investigation of the case if he would give them a net worth statement. This he refused. He was then asked for his records and he replied that he did not keep records. He was asked if he had any bank accounts, brokage accounts, safety deposit boxes or if he owned any property. He replied in the negative. He was then asked for the source of his funds and he stated that they came from an old mail bag and later in the conversation added, "Let's just say I dug up an old iron pot." He further stated to the investigators that he did not have income except from salary and that he was of the opinion that he did not have to keep records of those circumstances.

Under **Holland v. United States**, 1954, 348 U. S. 121, 138, the government may not "disregard explanations of the defendant reasonably susceptible of being checked." Appellant complains here that:

> "No effort was made to check defendant's statement that his funds came from an old mail bag. Such a statement should have been checked in view of the nature of defendant's conviction for mail robbery as

well as his statement to the Parole Board that he had received $3000.00 from the robbery."

Old mail bags and old iron pots are hardly the explanations "reasonably susceptible of being checked" referred to by the Supreme Court in the **Holland** case. We think, from a complete review of the evidence, that there was sufficient justification for the jury's conclusion that on December 31, 1946, the appellant's net worth was approximately $11,224.17 and that his net worth on December 31, 1947, was approximately $34,195.54. These figures were based on the agent's testimony and the records introduced, which were sufficiently authenticated to justify their presentation to the jury and sufficient to justify a denial of appellant's motion for judgment of acquittal.

Appellant's seventh point is that:

> "The Court erred in not instructing the jury as requested as to a lesser offense under Section 145 (a) (sic) of the Internal Revenue Code, and as to a lesser offense under Section 3616 (a) of the Internal Revenue Code."

Since preparation of appellant's brief, the Supreme Court affirmed this court in **Berra v. United States** (221 F. 2d 590), 351 U. S. 131, and held, at page 135:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616 (a) rather than § 145 (b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction."

Appellant's eighth point is that:

> "The Court erred in instructing the jury that it makes no difference whether income was lawfully or unlawfully received and that they could find an intent to commit the crime charged even though it is coupled

with an intent to suppress information as to acts which are criminal in other ways."

The giving of the challenged instruction is supported by the appellant's admission in his income tax returns that he had some income as a gambler and by his further statement that the source of his income might be from a mail bag or an old iron pot. Injection into the instructions of the possibility of the money being gained from illegal sources was fully supportable from the evidence. Certainly, otherwise relevant evidence does not become incompetent because it incidentally proves commission of independent offenses. **Hardy v. United States**, 8 Cir., 1952, 199 F. 2d 704; **Bram v. United States**, 8 Cir., 1955, 226 F. 2d 858. The exclusionary rule that prior offenses are not admissible against a defendant is not one of unbending rigidity. Thus, the rule will not be given application where the evidence is used to establish some material aspect of the prosecution's case. With equal vigor it is true that the rule may be disregarded in the court's instructions under proper circumstances. We have reviewed the court's entire charge and do not find it unfair to appellant.

Appellant's ninth point of error is that:

"The Court erred in instructing the jury that in arriving at their verdict they might consider the failure of defendant to supply information to the revenue agents."

The court herein instructed the jury:

"Any failure on the part of the defendant to supply any information for the purpose of the computation, assessment, or collection of his income tax, which you find to be unjustified or inexcusable, is a circumstance which may be considered in your determination of his guilt or innocence."

The court further instructed the jury that if relevant leads were not furnished to the agents, the government was not required to

> "* * * negate every conceivable source of nontaxable funds, and if the defendant failed to supply information to the agents in that regard, you may take such failure into account."

This court, in **Myres v. United States,** 1945, 174 F. 2d 329, cert. den. 338 U. S. 849, and **Olson v. United States,** 1951, 191 F. 2d 985, approved similar instructions. Appellant would distinguish the instant case on the theory that in the **Myres** and **Olson** cases the taxpayers were not advised that they were not compelled to furnish information. Here the appellant, in response to his question to the agent as to whether or not he was compelled to give a net worth statement, was told that he did not have to. The appellant then said that he would not give a net worth statement and further stated that he did not have records. In dealing with a similar instruction, the Court of Appeals for the Fourth Circuit, in **Beard v. United States,** 1955, 222 F. 2d 84, 93, cert. den. 350 U. S. 846, stated:

> "Moreover, the instruction related to the duty imposed by the taxing statutes upon the defendant to keep records of his transactions so that the extent of his liability to income tax might be ascertained; and therefore the case falls within the rule laid down in **Shapiro v. United States,** 335 U. S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787, which reviewed a conviction of violating the regulations under the Emergency Price Control Act and held that it was proper for the jury, in determining the issue of the defendant's guilt, to consider the business records of the defendant produced by him under a subpoena issued by authority of the statute It was held that all records which Congress, in the exercise of its constitutional powers, may require in

dividuals to keep in the conduct of their affairs relating to the public interest become public records in the sense that they fall outside the constitutional protection of the Fifth Amendment."

In the instant case, the appellant under the law was required to keep records. He stated that he did not do so. The fact that he did not keep records or the fact that he did keep records and refused to disclose them was a proper subject for comment by the court and we find no error in the instruction given.

Appellant's tenth point is that:

"The Court erred in overruling defendant's motion to dismiss the indictment based on the failure to present competent evidence before the Grand Jury, and the Court erred in not allowing defendant to ask every witness at the trial whether or not he testified before the Grand Jury in connection with this case."

During the pendency of this appeal, the Supreme Court, in **Costello v. United States**, 1956, 350 U. S. 359, determined this issue adversely to appellant's contention. After a review of the historical basis for grand jury proceedings, the Supreme Court ruled affirmatively on the question of whether or not a conviction could be sustained where only hearsay evidence was presented to the grand jury. The Fifth Amendment requires nothing more than that the grand jury be legally constituted and unbiased.

Appellant's eleventh point is that:

"The Court erred in overruling defendant's motion to dismiss the indictment on the ground that the indictment was barred by the statute of limitations."

It is the appellant's contention that:

"* * * the indictment charged an offense under Section 3616 (a), and that the general criminal statute of

limitaitions, 18 U. S. C. 3281, then three years, was applicabble."

This issuee is, then, dependent upon whether or not Section 3616 (a) iis applicable to income tax offenses. In **Dillon v. United Sttates,** 8 Cir., 1955, 218 F. 2d 97,[2] and **Berra v. United Sttates,** 8 Cir., 1955, 221 F. 2d 590, this court held that Sectiion 3616 (a) was inapplicable to income tax cases. In affirmiing this court in the **Berra** case (351 U. S. 131), the Supreeme Court did not pass upon that issue but limited its ddecision to the narrow question of whether the jury shoulld have been allowed to decide whether it would apply Seection 3616 (a) rather than Section 145 (b), and stated thiat that was not for a jury's determination. On the basiss, then, of our decisions in the **Dillon** and **Berra** cases, wee determine this issue against the appellant.

Appelliant's twelfth point is that:

> "The Court erred in overruling defendant's motion for aa mistrial because of a newspaper article concerning the case and did not properly interrogate the jurors relative to the prejudicial newspaper article."

On thee first day of trial, at the conclusion of the opening statteement, the court gave instructions to the jurors with refference to their duties and responsibilities. They were tolld not to read newspaper articles as they might tend to confuse them. The court stated:

> "'If anything appears in the newspapers from now on during the trial of this case the Court will direct you not to read the article, and I hope that you will be responsive to that direction and will not attempt to read it. If you read articles printed in the newspaper you will very frequently find that they are not correct, and they do not get every side. It is evidence of the poorest type."

---

[2] Certiorari granted 349 U. S. 914, later dismissed 350 U. S. 906.

On the following day counsel for the appellant offered in evidence a newspaper article which he claimed was "* * * so colored as to unduly bias and prejudice the jury, and it appeared in the St. Louis Globe-Democrat, the only morning paper, appeared in the evening issue of last night as well as this morning's issue." Appellant thereupon moved for a mistrial because of the article. The court stated:

> "The Court directed the jury not to read any newspaper articles that might appear, and if any did appear the Court will assume the jurors observed the direction of the Court. The motion is overruled."

Subsequently counsel for appellant asked the court:

> "May I ask the Court to inquire of the jury if they read this article?"

The court replied:

> "Yes. I will ask them, if any juror violated the instructions of the Court and read the article, if they did, hold up your hands."

No hands were raised. We think the matter came clearly within the discretion of the trial court. In addition, it does not appear that any of the jurors saw or read the article complained of. No abuse of discretion is shown where the trial court, under such circumstances, denies the motion for mistrial.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

**(Judgment.)**

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15360—September Term, 1955.

Thursday, August 16, 1956.

Louis C. Smith, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Louis C. Smith, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

August 16th, 1956.

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 412

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LOUIS C. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 25-41) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals (Pet. 42) was entered on August 16, 1956. The petition for a writ of certiorari was filed on September 13, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether prosecution for a violation of Section 145(b) of the Internal Revenue Code of 1939 is barred by limitations after three years merely because the indictment and proof would also support a conviction for violating Section 3616(a) of the Code.

2. Whether the trial court unduly restricted defense counsel's cross-examination of a Treasury agent.

3. Whether the trial court committed reversible error in instructing the jury that it might take into account petitioner's failure to supply information for use in the computation, assessment or collection of his income tax.

4. Whether the trial court erred in refusing an instruction requested by petitioner under which the jury would have been permitted to find him guilty of the misdemeanor proscribed by Section 145(a) of the Internal Revenue Code of 1939.

## STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> (a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax, make such return, keep such records, or supply

such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined, not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 3616.)

SEC. 3748. PERIODS OF LIMITATION.

(a) Criminal prosecutions. No person shall be prosecuted, tried or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

* * * * *

(26 U.S.C. 1952 ed., Sec. 3748.)

Federal Rules of Criminal Procedure:

**Rule 31.**

**Verdict**

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * *

**STATEMENT**

On November 13, 1953, an indictment was filed against petitioner in the United States District Court for the Eastern District of Missouri, charging him with a wilful attempt to evade his income tax for the year 1947, in violation of Section 145(b) of the Internal Revenue Code of 1939, by filing a false and fraudulent income tax return. The amounts of income and the tax due thereon as reported in the return and as corrected were alleged to be as follows (R. 1-2):

| Reported | | Corrected | |
|---|---|---|---|
| Income | Tax | Income | Tax |
| $3,690.04 | $343.00 | $39,984.49 | $17,759.58 |

Petitioner's pre-trial motion to dismiss the indictment, alleging, *inter alia*, that prosecution was barred by the three-year statute of limitations, was denied. (R. 2-3, 8.) After a jury trial, petitioner was found guilty. On June 2, 1955, the court imposed a prison sentence of a year and a day and a fine of $2,000. (R. 208, 214-215.)

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized briefly as follows:

At the outset of the investigation into petitioner's tax liabilities he advised the agents that he kept no books or records, had no bank or brokerage accounts and no safety deposit boxes. When the agents inquired as to the source of his funds, he stated that they came from an old mail bag. Later he suggested, "Let's just say I dug up an old iron pot." (R. 117.)

The Government's evidence showed that petitioner's unreported income, computed on the net worth-expenditures method, was $23,597.94. (R. 123-124.) The net worth starting point proof included evidence that petitioner had filed no income tax returns for the years 1932 through 1941, during which time he was imprisoned in a federal penitentiary; that he had had no substantial amount of cash when he left prison in 1941; that his reported income for the years 1942 through 1945 was only nominal, reaching a high of $2,490 in 1945; that he reported $5,477.96 in 1946; and that he had received no gifts or inheritances. (R. 14, 16, 17, 21, 23-24, 31, 38, 49-50, 117, 127-130.) No witnesses testified for the defense.

Petitioner requested an instruction under which the jury would be permitted to find him guilty of a violation of Section 145(a) of the Internal Revenue Code if it found that he had wilfully failed to pay a tax, make a return, keep records or supply information. (R. 203-204.) This request was refused.

## ARGUMENT

1. Petitioner's main contention (Pet. 10-17) is that the indictment, while purporting to charge an offense under Section 145(b) of the Internal Revenue Code of 1939 (*supra*, p. 3), in fact charged only a violation of the misdemeanor proscribed by Section 3616(a) of the Code (*supra*, p. 3). He argues from this that the three-year statute of limitations (Section 3748 of the Code) barred prosecution under Section 3616(a) after February 19, 1951, whereas the indictment was

not found until November 13, 1953. (R. 1.) The contention is without merit.

The indictment followed the language of Section 145(b) in charging that petitioner did "Willfully * * * attempt to defeat and evade a large part of the income tax due and owing by him". (R. 1.) The means of evasion alleged was the "filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return * * *". Whatever other offense may have been thus alleged, it is clear that the indictment charged a violation of Section 145(b). *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 149, 159; *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1st) certiorari denied, 340 U. S. 917; *Rick* v. *United States*, 161 F. 2d 897, 898-899 (C.A. D.C.); *United States* v. *Rosenblum*, 176 F. 2d 321, 329-330 (C.A. 7th); *United States* v. *Croessant*, 178 F. 2d 96 (C.A. 3d), certiorari denied, 339 U.S. 927.

Section 3748 of the Code prescribes a three-year statute of limitations for offenses against the revenue, with certain exceptions, among which is that "the period of limitation shall be six years * * * for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof * * *" (*supra*, p. 4). It seems clear, therefore, that the six-year limitation applies. In this case, as in *Berra* v. *United States*, 351 U. S. 131, 134, "the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false

return with 'intent' to evade taxes (§ 3616(a)). In this instance §§ 145(b) and 3616(a) covered precisely the same ground." We submit that the overlap of the two sections in the area within which the facts of this case fall cannot mean that, merely because the indictment and the proof are sufficient to support a conviction under either section, the six-year limitation provided by Section 3748(a)(2) (*supra*, p. 4) must be nullified.

2. Petitioner contends (Pet. 17-20) that his cross-examination of the Treasury agent with respect to petitioner's ownership of stock in the Plaza Amusement Company was unduly restricted. The contention is without merit. On direct examination the agent testified that he had included in petitioner's closing net worth an amount of $16,600 representing petitioner's ownership of 166 shares of the stock on the basis of three documents in evidence and the testimony of two witnesses. (R. 123, 125.) On cross-examination defense counsel inquired as to whether the agent was not engaged in an investigation of the Plaza Amusement Company for the purpose of proving "that stock is being held in fictitious names there, that they are only straw parties * * *" (R. 134.) The agent answered that he was not authorized to testify about the affairs of any taxpayer except petitioner. (R. 134, 135.) The trial judge then refused petitioner's offer to prove that the agent "has made statements in question that he propounded indicating that he believes that the * * * record owners of the stock, stockholders in the Plaza Amusement Company are not the real owners * * *" on the basis of the Government's objection that

"the only person on trial here is Louis Smith * * *" (R. 135.) Later, defense counsel pursued the matter further, but always insisted upon prefacing his question with a reference to the agent's investigation of the Plaza Amusement Company. (R. 144-146.) The court cautioned him in these words (R. 146):

> * * * You have no right in examining this witness to go into the affairs of anyone except the defendant. There are very strict penal laws about revealing the information of other income taxpayers, and this man is bound by those restrictions.

We think the record is clear that if defense counsel had confined his questions to matters relevant to the case, i.e., facts within the agent's knowledge relating to petitioner's affairs, his questions would have been answered. His failure to do so, and his insistence upon invariably making reference in his questions to the affairs of other taxpayers, make it clear that the restrictions on his cross-examination were self-imposed. Moreover, if it were a fact that petitioner was not the true owner of the stock at the time in question, it would have been a simple matter for him to introduce evidence of that fact.

3. Petitioner contends (Pet. 20-21) that his privilege against self-incrimination was infringed by the court's instructions to the jury that it might take into account his failure to supply information to the agents. This argument is based on the agent's testimony that petitioner refused to furnish a statement of his net worth as of October 5, 1951, after being advised by the agent that he was not compelled to an-

swer any "questions that might be used against him". (R. 117.)

The first instruction complained of was as follows (R. 190):

> Any failure on the part of the defendant to supply any information for the purposes of the computation, assessment, or collection of his income tax, which you find to be unjustified or inexcusable, is a circumstance which may be considered in your determination of his guilt or innocence. * * *

In the first place it is difficult to see what, if any, probative value a net worth statement as of October 5, 1951, would have in a prosecution for evasion of 1947 income taxes. There was no reference to this incident in the instruction, and petitioner has apparently selected it because of its proximity in the record to the warning of constitutional rights. (R. 117.) It is at least doubtful that petitioner claimed any privilege (see *Emspak* v. *United States,* 349 U. S. 190, 194) but if he did it was immediately waived when he answered all the agent's questions relating to his assets, refusing only to account for the source of his funds. (R. 117.)) We think the court's instruction must be taken to refer to such matters as petitioner's insistence that he kept no books, his statement that his funds came from an old mail bag, and his later suggestion "Let's just say I dug up an old iron pot." (R. 117, 118, 119.) In any event, the instruction complained of was not erroneous. *Beard* v. *United States,* 222 F. 2d 84, 92-95 (C.A. 4th), and cases cited, certiorari denied, 350 U. S. 846; *Myres* v. *United States,* 174 F. 2d 329, 337

(C.A. 8th); *Olson* v. *United States,* 191 F. 2d 985, 988-989 (C.A. 8th).

The other instruction complained of was as follows (R. 194):

> As I have previously stated, the burden rests upon the Government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources. In other words, net worth increases and expenditures do not establish the receipt of taxable income unless the evidence also shows a likely source of income from which you believe they sprang.
>
> If the defendant offers to the Treasury Agents explanations of the source of his funds which are reasonably susceptible of being checked, the Government may not disregard them; and you may take into consideration any failure by the Government to run down such explanations, if any were made, or the results of any investigation made by the Government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the Government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information to the agents in that regard, you may take such failure into account. He is not required, however, to prove the source of his net worth, for, as I have said, the burden is on the Government to prove that the increase arose from taxable sources.

Plainly, this instruction was entirely proper. It merely told the jury that on the question of the source of petitioner's funds, i.e., whether taxable or non-tax-

able, the jury might take into account the taxpayer's failure to furnish leads, just as it might take into account the agent's failure to run down any reasonable leads furnished. Moreover, this second instruction was not objected to at the trial.

4. Petitioner's final contention (Pet. 21-24) is that the trial court erred in refusing to instruct the jury that he could be convicted of violating Section 145(a) of the Code (*supra*, pp. 2-3) if it found that he wilfully failed to pay his tax, make a return, keep records, or supply information required by law. He argues that Rule 31(c), Federal Rules of Criminal Procedure, applies here because a violation of Section 145(a) is "necessarily included in the offense charged" (Pet. 22), even though not set out in the indictment. The contention is without merit because (1) the offenses proscribed by Section 145(a) are separate and distinct from that condemned by Section 145(b), and are not necessarily included within the latter; and (2) the requested instruction was incomplete and erroneous.

(1) The acts of omission made misdemeanors by Section 145(a) are not necessarily included in the offense charged in the indictment but are separate offenses, distinct in law. To make out the felony of attempted evasion it is necessary to prove an act of commission, i.e., the existence of a tax liability and some affirmative act done in a wilful attempt to evade or defeat it. To make out the misdemeanor it is necessary to show an act of omission—a wilful failure to do a certain thing required by the statute or regulations. *Spies* v. *United States*, 317 U. S. 492. Sections 145(a)

and (b) define not a greater and lesser offense, for both of which a taxpayer may be prosecuted under a single count, but offenses separate and distinct in law, which can be prosecuted in separate counts. The Third Circuit recently adverted to the separate nature of the two offenses in a case in which the taxpayer had been convicted of violation of both Section 145(a) and Section 145(b) for the same year. *United States* v. *Kafes*, 214 F. 2d 887, 890-891 (C.A. 3d), certiorari denied, 348 U. S. 887. Cf. *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377.

(2) The requested instruction (R. 203-204) was patently inadequate and erroneous. It did not purport to advise the jury under what state of the evidence they should consider whether petitioner had violated Section 145(a), or as to what aggravating incident, insufficiently proved, could be a basis for choice between the offenses. It is well settled that, where a "necessarily included offense" instruction is required, the jury must be directed to determine first whether the defendant is guilty of the offense charged in the indictment, and if they find that he is not, or if they have a reasonable doubt as to whether the aggravating ingredient has been proved, then and only then should they inquire into whether he is guilty of the lesser, necessarily included offense. *McAffee* v. *United States*, 105 F. 2d 21, 31 (C.A. D.C.); *Goodall* v. *United States*, 180 F. 2d 397, 400 (C.A. D.C.), certiorari denied, 339 U. S. 987; *Sekinoff* v. *United States*, 283 Fed. 38, 40 (C.A. 9th). If the court had given the instruction requested by petitioner, the jury would have become

hopelessly confused. They could not have known under what state of the evidence a conviction under each statute would have been proper, or whether they could properly convict under only one or under both statutes. The patent inadequacy of the requested instruction amply justified its rejection.

## CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

J. Lee Rankin,
*Solicitor General.*
Charles K. Rice,
*Assistant Attorney General.*
Richard B. Buhrman,
Ronald C. Meteiver,
*Attorneys.*

October, 1956.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 412.

LOUIS C. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

## MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., 416 North Eighth Street. CEntral 1-4477.

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Section 3616 (a).....2, 3, 4, 5, 6

Section 3748 ..... 4, 5

Internal Revenue Code of 1954:

Section 6531 ..... 5

Section 7207 ..... 6


**Miscellaneous:**


H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 4564, 4573..... 6

H. R. Rep. No. 2543, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5340..... 6

S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5236, 5253..... 6

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 412.

LOUIS C. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

## MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

### (a) MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on November 13, 1956. Rehearing is sought at this time because this Court on January 28, 1957, granted

certiorari in **Costello v. United States**, No. 666, October Term, 1956, and on March 4, 1957, this Court vacated its order of November 19, 1956, denying certiorari and granted certiorari in **Achilli v. United States**, No. 430, October Term, 1956, which cases, as is pointed out more fully in the annexed petition, contain a related question to the first question presented in the instant petition for certiorari. The **Costello** and **Achilli** cases involve the question as to whether the provisions of Section 145 (b) or Section 3616 (a) of the Internal Revenue Code of 1939 govern the sentence which may be imposed under a charge of evading taxes by means of the filing of a fraudulent return. The first question presented in the instant petition for writ of certiorari was stated in the brief of the United States in opposition as follows:

> "Whether prosecution for a violation of Section 145 (b) of the Internal Revenue Code of 1939 is barred by limitations after three years merely because the indictment and proof would also support a conviction for violating Section 3616 (a) of the Code."

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. **Roberts Sash & Door Co. v. United States**, 282 U. S. 829; **Duquesne Steel Foundry Co. v. Burnett**, 282 U. S. 830; **Douglas v. Willcuts**, 295 U. S. 722; **Silesian-American Corp. v. Clark**, 332 U. S. 469, 474; see **R. Simpson & Company v. C. I. R.**, 321 U. S. 225, 229.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
St. Louis 2, Missouri,
Counsel for Petitioner.

## (b) PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of November 13, 1956, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed September 13, 1956, herein.

### Reasons for Granting the Rehearing and Issuing the Writ.

At the time of this Court's order of November 13, 1956, this Court had not granted certiorari in **Costello v. United States**, No. 666, October Term, 1956, or **Achilli v. United States**, No. 430, October Term, 1956. Those cases present these questions: "Whether petitioner could be prosecuted and sentenced as for a violation of Section 145 (b) of the Internal Revenue Code of 1939 where the facts also showed a violation of Section 3616 (a) of the Internal Revenue Code of 1939," and "Can convicted tax evasion defendant be sentenced under Section 145 (b) of the 1939 Internal Revenue Code rather than under Section 3616 (a) where the indictment charged only the filing of a false and fraudulent return." The related question presented by this petitioner in his petition for a writ of certiorari is as follows:

> "In **Berra v. United States**, 351 U. S. 131, the government contended, and this Court assumed arguendo, that an indictment which charged an attempt to evade income taxes by filing a fraudulent return charged both a felony offense under § 145 (b) and a misdemeanor offense under § 3616 (a) of the Internal Revenue Code of 1939. The first question presented is: Whether an indictment charging an attempt to

> evade taxes by filing a fraudulent return (which indictment was returned more than three years after the filing of said return) is barred by the three-year statute of limitation applicable to offenses under § 3616 (a) or whether the six-year statute of limitations applicable to offenses under § 145 (b) governs."

This, the instant case, as do **Costello** and **Achilli,** involves the overlap of Section 145 (b) and Section 3616 (a) of the 1939 Internal Revenue Code.

The indictment herein charged that petitioner did attempt to defeat and evade a large part of the income tax due and owing to him by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return (R. 1). Section 3748 of the Code prescribed a three-year statute of limitations for offenses against the revenue with certain exceptions, among which is that "the period of limitations shall be six years * * * for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof * * *." Petitioner's contention is that the instant indictment, while purporting to charge an offense under Section 145 (b) of the Internal Revenue Code of 1939 in fact charged only a misdemeanor violation proscribed by Section 3616 (a) of the Code and the three-year statute of limitations under Section 3748 of the Code barred prosecution under Section 3616 (a) after February 19, 1951, whereas the indictment was not found until November 13, 1953 (R. 1). The government's argument opposing certiorari was as follows:

> "In this case, as in **Berra v. United States,** 351 U. S. 131, 134, the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return [§ 145 (b)] were identical with those required to prove that he delivered false returns with 'intent' to evade taxes [§ 3616(a)]. In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground. We

> submit that the overlap of the two sections in the area within which the facts of this case fall cannot mean that, merely because the indictment and the proof are sufficient to support a conviction under either section, the six-year limitation provided by Section 3748 (a) (2) (supra), page 4, must be nullified." Brief for the United States in opposition, pages 7-8.

The government did not contend that the three-year limitation period is not applicable to offenses under Section 3616 (a).

The allegations in the instant indictment should be construed to charge only an offense under § 3616 (a) rather than an offense under § 145 (b). This was the view of the dissent in the **Berra** case which said: "Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145 (b)." 351 U. S. 131, 138. The majority opinion did not reach this issue.

The contention of petitioners in the **Costello** and **Achilli** cases is that punishment of an offense like the one charged in the instant indictment can only be under the misdemeanor provisions of Section 3616 (a). If this be so, it would follow that the statute of limitations relative to that section would be the only one applicable. Otherwise, the government could wait till the statute of limitations for the lesser offense ran and claim that since it could not prosecute for the lesser offense because of the limitation period it could still prosecute for the greater offense. Such an anomalous result was never intended by Congress. Moreover, the Internal Revenue Code of 1954 has recognized that the three year limitation period is applicable to offenses under 3616 (a). Section 6531 of the Internal Revenue Code of 1954 has replaced Section 3748 of the 1939 Code in regard to the period of limitations. The report of the House Committee relative to the Internal Revenue Act of 1954 was that Section 6531 changed existing law by providing a six

year period of limitations for various offenses, including crimes under Section 7207, the 1954 Code equivalent of Section 3616 (a). H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 4564. The Senate Committee report after stating that the house bill changed existing law by providing a six year period of limitations for offenses under Section 7207 and other specific internal revenue violations, concluded: "Your Committee has restored the existing law with respect to the period of limitations applicable to each of these offenses." S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5236. The conference report adopted the House version.*

## CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

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* H. Rep. No. 2543, 83d Cong., 2d Sess. (1954), 1954 U. S. Code Congressional Service 5340, provides: "Amendments Nos. 486 (1) (2) (3). These amendments to Section 6531 of the House bill removed from the listed criminal offenses to which the six-year period of limitation applies under the bill the following offenses: (1) The offense of willfully failing to pay the tax or make any tax return at the time or times required by law or regulations; (2) the offenses described in Sections 7206 (1) and 7207, relating to false statements and fraudulent documents; (3) the offense described in Section 7212 (a) relating to intimidation of officers or employees of the United States; and (4) the offenses described in Section 7214 (a) committed by officers and employees of the United States. The Senate recedes."

**Certificate of Counsel.**

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Morris A. Shenker,

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Sidney M. Glazer,
Counsel for Petitioner.